

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In re:

CHAMELEON RADIO CORPORATION)

)

Order to Show Cause Why the License of)

Station KFCC(AM), Bay City, Texas)

Should Not Be Revoked)

)

Request for Extension of Special Temporary)

Authority)

MM Docket: 96-173

FCC 97D-11

To: Before the Commission

EXCEPTIONS AND BRIEF
OF
CHAMELEON RADIO CORPORATION

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October 31, 1997

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1. Chameleon Radio Corporation excepts to the initial decision of Judge Joseph Chachkin to revoke the operating license of Station KFCC(AM) at Bay City, Texas.

Statement of the Case

2. In August, 1996, Commission staff issued an order to show cause why the license of Station KFCC (AM) should not be revoked and ordered a hearing be conducted before Administrative Law Judge Joseph Chachkin. That hearing was held on February 28, 1997 the result of which was an initial decision by Judge Chachkin ordering the revocation of KFCC's license to operate in September, 1997.

3. Chameleon submits Judge Chachkin erred in making his decision based upon the facts presented, and first through his decision not to allow into the record pertinent and compelling evidence relating to KFCC's unique programming service.

4. Judge Chachkin also erred in determining that Chameleon acted in bad faith in its dealings with Commission staff regarding the 1995 STA and subsequent renewals of that STA.

Issues Presented

Two issues are presented in this Exception presentation:

1. Whether the commission should consider the unique programming service provided by Chameleon?
2. Whether Chameleon demonstrated good faith in its dealings with commission staff during the course of events in this case?

Argument Regarding Unique Programming Service

5. Chameleon has repeatedly shown evidence that it's programming which aired first on KENR and then on KFCC, was unique and served communities throughout the greater Houston metropolitan area which heretofore had no broadcast outlet of any kind. More than the generally served Hispanics or African American communities (although those communities were and continue to be served by KFCC), KFCC served other growing nationalities including Greek, Indian, Pakistani, Nigerian, Philippine, Iranian, Argentinean, Russian, Vietnamese, Peruvian, Cuban, Rumanian, Sri Lankan, and El Salvadoran communities as well as religious programming ranging from Christian to Hindu to Islamic to Baha'i. These communities constitute a block of persons more than 200,000 strong who, prior to KENR and KFCC had no broadcast outlet.

6. No other station in the Houston metropolitan area provided such an important outlet for public service to these ethnic and foreign listeners in the south eastern part of

Texas. Indeed, Chameleon submitted a total of thirty three pages of evidence from programmers and listeners to the station which thoroughly demonstrated both KFCC's commitment to the various ethnic communities residing in the greater Houston area, but its overall commitment to innovative programming which was targeted at a larger, more general audience,.

7. English speaking programs on KFCC such as Radio Recovery, gave voice to an audience also all but completely ignored by the rest of broadcasting. Radio Recovery was a program hosted by Stephen Mallia, a recovering alcoholic who each morning ran an hour-long program targeted at substance abusers and their recovery. This program featured daily interviews with other recovering substance abusers who had made it through the difficult recovery process and offered hope and encouragement to listeners attempting to cope with the same problems. The program routinely received letters from people who simply found the program by turning past the frequency on the dial, came across the program, and decided to listen. The results often reported in Mr. Mallia's mail was a life changing experience that lead the listener to make major changes in their lives.

8. Other programs such as Radio South Asia, offered weekly guest spots on their program to doctors, lawyers, and community leaders who spoke the language of the audience and could assist with details which the likes of which listeners often didn't even know were available to them.

9. When the abused wife of an El Salvadoran immigrant suffered the loss of both of her legs as a result of her husband's use of a shotgun, only one radio program in the city, Aqui El Salvador, which aired on Sunday mornings spent its entire three hour

program in a telethon to gather funds for the woman's return to El Salvador and her family. More than enough money was raised to send both the woman and her children back to their home in El Salvador.

10. Regardless of the language or the audience targeted, virtually all programmers on KFCC put forth a huge percentage of their time on the air doing the kinds of public service work listed above. The result was the individual being helped, his/her family, and the community as a whole were all much better off for having a program on the air which talked with and two that community. A sampling of such letters was presented by Chameleon in the documentation which was disallowed by Judge Chachkin.

11. Chameleon's actions beginning in April, 1995 were all aimed at preserving this unique and singular programming service within the community.

Issues Regarding Chameleon's Good Faith

12. Judge Chachkin's decision also erred in finding that (Chameleondemonstrated at hearing that it can not be trusted." (ID p. 38, p. 14) Through its president, Don Werlinger, Chameleon demonstrated throughout the process while it aggressively held it line on matters before the Commission and spared no effort to present its case to the Commission's staff. Bad actors do not present themselves in person not once, but five times before Commission staff to plead their case and ask for help. And, in all but the final ruling, the STA in question was reinstated and continued.

13. With two notable exceptions (James Burtle and John Vu), whose actions are clearly demonstrated as both arbitrary and purposefully adverse to Chameleon, every

commission staff member contacted by Chameleon during the course of the now two and a half years since the STA was granted has worked to settle the case.

14. In conducting itself as it did, commission staff ignored its own long established policies regarding granting of construction of new towers for STA's and sought to enforce new and heretofore unprecedented policy. In fact, in response to interrogatories, the commission admitted it had no written policy regarding antenna construction. John Vu showed beyond a shadow of a doubt that he had little understanding of the policy regarding STA grants even though the authority for issuing such grants was placed in his hands. Mr. Vu's. (Chameleon Reply Comments, pp. 3-9, para. 6-17).

15. In taking the actions it took regarding construction of a tower, Chameleon took action to conform with and comply with Mr. Vu's mistaken beliefs. Chameleon constructed a nonbroadcast tower which required no authority from the commission. The tower's construction was complete before its use was presented to Mr. Vu for its use as an AM broadcast facility. No use of the tower was made for broadcast use and no construction of the folded unipole antenna was attempted prior to the grant of the original STA on May 5, 1995.

16. In dealing with Mr. Vu and his new set of policies, Chameleon simply made use of the only avenue left it by a ill-informed and misguided member of the commission's staff. The number of errors in Mr. Vu's original letter granting STA is clear evidence of his lack of knowledge in making such grants. In stating that there was an absolute prohibition on the construction of new towers for STA use, Mr. Vu was

wrong. This was demonstrated in its original letter of inquiry in July, 1995 when the staff letter states, "we are disinclined (emphasis added) to grant authority in cases where the applicant intends a construction of permanent facilities." The case law cited in the letter, Patton Communications Corp., 48 RR 2d 349 (1980), staff defends its position on the matter, when in fact, a reading of the case shows the opposite view should prevail. (Chameleon Finding of Fact, pp. 6-10, para. 6-24)

17. For his part, Mr. Burtle was abrupt, condescending, and arrogant. Each time Mr. Werlinger made a trip to Washington to tell his story to yet another member of the staff, his plight received positive responses until Mr. Burtle was asked to comment on the case. Each time, Mr. Burtle painted a picture of Chameleon as a rouge licensee bent on breaking the rules. Nothing could be further from the truth.

18. Further, the lack of consistency in dealing with Chameleon as opposed to other licensees is brought into clear focus when viewed juxtaposed to the case of KVCJ, Canton, Texas. (Chameleon Findings of Fact, pp. 12-12-15, para. 31-38) In a case very parallel to the Chameleon case, a case in which Mr. Werlinger had acted as the technical consultant to the licensee, commission staff treated the licensee of KVCJ very differently from its treatment of Chameleon. For more than three years, KVCJ operated under STA and even after the Chameleon case had received much attention, the KVCJ STA was renewed again and again, as late as January, 1997.

19. Before May, 1995, Mr. Werlinger had established a long and unblemished record before the Commission (Chameleon Findings of Fact, pp. 19-20, para. 50). He was not a scofflaw and had absolutely no history of malicious disregard for the

commission's rules and regulations. In fact, acting as a consultant to other broadcasters and on his own behalf, Mr. Werlinger had established a record replete with examples of work resulting in more efficient utilization of both the AM and FM spectrums and more communities receiving better service on each band.

20. Finally, a complete review of both Chameleon's Findings of Fact and Conclusions of Law and its Reply Comments provides a view of the situation regarding the KFCC STA much different from that painted by commission staff. Mr. Werlinger was both aggressive and challenging in his response to Messrs. Vu and Burt. However, rather than attempting to conceal and mislead, Mr. Werlinger provided ample and open responses to the staff throughout the process. His aggressive stance admittedly stretched the bounds of compliance with Mr. Vu's stated, though ill-conceived understanding of the commission's policy regarding grant of STA's.

Resolution of Proceeding By Sanctions

21. If it is the view of the Commission that sanctions should be imposed as a result of Mr. Werlinger's actions, Chameleon proposes a forfeiture in the amount of Fifty Thousand Dollars (\$50,000) and Chameleon's written assurance that it will strictly comply in the future with all commission directives, rules and regulations regarding its operation of KFCC.

Conclusion

22. Chameleon has also demonstrated that the issuance of its proposed construction permit to reallocate KFCC's city of license and increase its daytime power both serves the commission's stated goal of reducing licensed overlap between stations

and provides first service to one of the fastest growing communities in the United States.

Therefore, the grant of the application is in the public interest and should be made a part of the settlement proposed herein.

Respectfully submitted,

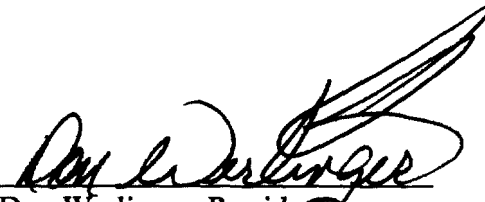
A handwritten signature in black ink, appearing to read "Don Werlinger", written over the typed name.

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October 31, 1997

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing APPELLANT'S EXCEPTIONS AND BRIEF has on this 3rd Day of November, 1997, been delivered via Federal Express C. to the Offices of the William Kennard, General Counsel, Federal Communications Commission, Washington, D.C. 20554, and to the offices of Alan Aronowitz, counsel for the FCC at 1919 M Street, Suite 8210, Washington, D.C. 20554 Additional copies of the above have been sent via Federal Express Courier to the offices of the Secretary, Federal Communications Commission, Second Floor, 1919 M Street, N.W., Washington, D.C. 20554.


Don Werlinger, President
Chameleon Radio Corporation